(2)

89-5072

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

RICHARD JAMES WILKERSON, Petitioner

VS.

THE STATE OF TEXAS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

SHULTS, HETHERINGTON & TARICS

BY: Robert A Shults
ROBERT A. SHULTS
1800 West Loop South, #950
Houston, Texas 77027
(713) 961-1823
Texas Bar No. 18323500

Counsel for Petitioner

31 pp

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 383,749

RICHARD JAMES WILKERSON, Petitioner

VS.

THE STATE OF TEXAS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

The Petitioner, Richard James Wilkerson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals entered on May 15, 1989, in which the Petitioner's application for writ of habeas corpus was denied by the Court of Criminal Appeals. It is realized by the Petitioner that applications for a writ of certiorari directed to state appellate courts in regard to their denials of applications for writs of habeas corpus are not favored and are routinely denied. However, it is asserted that the facts are clearly developed in this case so as to present this court with a clear case of the use by the prosecution of racial factors in the exercise of its peremtory challenges to the jury and that close scrutiny should be given to this application by reason of this fact.

QUESTIONS PRESENTED FOR REVIEW

1. The trial court, after holding a hearing on the Petitioner's application for a writ of habeas corpus, made findings of facts and conclusions of law upholding the prosecution's use of its peremtory challenges to strike all of the black prospective jurors during jury selection. However, one

of the prosecutors testifying in regard to certain of the jury selection processes, candidly admitted that the common race of at least two the prospective jurors and the Petitioner was a factor in his decision to exercise peremtory challenge against those jurors. The issue is whether the failure of the trial court to consider this admission by the prosecutor was an abuse of discretion and whether the consideration of race as a factor in the exercise of peremtory challenges by the State violates the provisions of Section 1 of the Fourteenth Amendment of the United States Constitution which guarantees the equal protection of the law and whether such activity also violates the provisions of the Sixth Amendment wherein trial by an impartial jury is likewise guaranteed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REFERENCE TO REPORTS BELOW

1. Petitioner was tried in the District Court of Harris County, Texas, 179th Judicial District for the offense of capital murder. Trial proceedings are not published in Texas, but the trial record is available from the Texas Court of Criminal Appeals.
2. On May 14, 1986, judgment was rendered affirming this conviction by the Texas Court of Criminal Appeals sitting en banc. This opinion is published at 726 S.W.2d 542.
3. On or about August 12, 1987, the Petitioner filed an application for writ of habeas corpus and an affidavit stating that he was indigent. In the application, the Petitioner advanced several grounds for the reversal of his conviction including the contention that the State utilized its peremtory challenges during jury selection to eliminate all black potential jurors from the petit jury in violation of the "equal protection" clause of the Fourteenth Amendment as well as the "impartial jury" clause of the Sixth Amendment and pursuant to the opinions in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d, 759 (1965) and Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 9 L.Ed. 2d 69 (1986).
4. The trial court entered findings of fact and conclusions of law stating, relative to the jury selection issues, that the Petitioner did not object to the use by the prosecution of its peremtory challenges to strike blacks from the jury panel until the motion for new trial hearing and had, therefore, waived his right to a Batson hearing in regard to the application for writ of habeas corpus. The Texas Court of Criminal Appeals remanded the application to the trial court for a hearing on the equal protection issues pursuant to the holding of Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

5. After an evidentiary hearing, the trial court signed the proposed findings of fact and conclusions of law submitted by the State and transmitted the recommendations contained therein to the Texas Court of Criminal Appeals. A true and correct copy of the findings of fact and conclusions of law as executed by the trial court is attached hereto in the Appendix. The trial court specifically refused to adopt the proposed findings of fact and conclusions of law as submitted by the Petitioner, which document is likewise attached hereto in the Appendix.
6. On May 15, 1989, the Texas Court of Criminal Appeals denied the Petitioner's request for a writ of habeas corpus. A true and correct copy of the order of the Texas Court of Criminal Appeals is likewise attached hereto in the Appendix.
7. Since the Texas Court of Criminal Appeals vacated the stay of execution, which had previously been entered pending its decision on the application for writ of habeas corpus, the trial court has now sentenced the Petitioner to be executed on August 3, 1989.

STATEMENT OF GROUNDS OF JURISDICTION

1. Jurisdiction is conferred on this Court by the provisions of 28 U.S.C. 1257, 18 U.S.C. 3772, and Rule 17, Revised Rules of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. Amend. XIV, Sec. 1.

2. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Constitution Amendment VI.

STATEMENT OF THE CASE

The Petitioner was charged by indictment with the offense of capital murder. At the jury selection stage of the trial, the prosecution exercised four of its twelve peremtory challenges against black venire persons. The Petitioner is black and, by reason of the State's exercise of its peremtory challenges against the black venire persons, no blacks served on the petit jury.

The four black venire persons who were struck by the State include Ms. Audrey Dorsey, Ms. Perlie Doze, Ms. Ruthie Hines, and Ms. Gloria Price.

For reasons stated in more detail in the findings of fact made by the trial court, prosecutor Keno Henderson articulated certain reasons for exercising peremtory challenges against Ms. Dorsey, Ms. Doze, and Ms. Hines that the court found to be race-neutral.

However, during his testimony at the Batson hearing, Assistant District Attorney Henderson testified as follows:

1. Testimony regarding Audry Dorsey - pursuant to cross-examination by Petitioner's counsel relative to his thought processes in regard to the decision to strike Ms. Dorsey, the following testimony of Assistant District Attorney Henderson transpired:

Q. You know, I am not attacking you, but I have to try to pin you down. When you say you felt a little uneasy about her generally, was it your considered opinion that the fact that she was black and that the Defendant was black might have some factor or might be some factor in her decision-making process?

A. I was not complete satisfied that it would not, but that was my uneasiness.

Q. So in addition to other factors, there was some uneasiness in your mind and your thought processes about the fact that she was black and Mr. Wilkerson was black?

A. Well, no, about the questions in general. But, yeah, about the fact that she was black and the Defendant was black.

2. Examination Regarding Ms. Perlie Doze - under cross-examination regarding his reasons for exercising a peremtory challenge in regard to Ms. Doze, Mr. Henderson testified as follows:

Q. But, beyond these equivocal answers that you got and these concerns that you had, did it additionally concern you to some extent that she was black and Mr. Wilkerson was black and that that might, and she worked in a lounge that you thought of as being not on the up and up?

A. The only thing I thought perhaps that might come into play would be where when she made the statement he is a nice, young man. I thought perhaps she might make some identification, I guess, with the Defendant to some extent, but.

Q. Based on being of the same race?

A. Yeah, that is just a factor.

Additionally, Mr. Henderson further testified as follows on re-direct examination by the State regarding venire person Perlie Doze:

Q. Mr. Henderson, isn't it a fact that many of the State's witnesses were also black witnesses; is that correct?

A. Yes, that is true, as I recall.

Q. And that any consideration that you just mentioned that you might have given between the feeling of identity between Ms. Doze and the Defendant would also work in your favor with regard to your black State's witnesses; is that correct?

A. Well, that is true.

Q. And that that was not a major consideration or the sole consideration for your striking Ms. Doze?

A. One of the many considerations but nothing major about that.

REASONS FOR GRANTING THE WRIT

1. THE FINDINGS OF THE TRIAL COURT IN REGARD TO THE PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS AND THE ACCEPTANCE BY THE TEXAS COURT OF CRIMINAL APPEALS OF THOSE FINDINGS WITHOUT CONSIDERATION OF THE CLEAR ADMISSION OF THE PROSECUTOR THAT RACIAL CONSIDERATIONS WERE A FACTOR IN HIS EXERCISE OF HIS PEREMTORY CHALLENGES AGAINST THE PROSPECTIVE BLACK VENIRE PERSONS SHOW A CONSCIOUS DISREGARD FOR THE FACT THAT RACE WAS A CONSIDERATION AND A FACTOR IN REGARD TO THE EXERCISE OF THE STATE'S PEREMTORY CHALLENGES. THIS IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND OF THE IMPARTIAL JURY CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In its attempt to fairly interpret the Equal Protection

Clause of the United States Constitution, this Court has previously stated that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." Swain v. Alabama, 380 U.S.at 203-204. Likewise, a black criminal defendant has the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria and this guarantee mandates an Equal Protection review of the State's privilege to strike individual jurors through peremtory challenges. Batson v. Kentucky, 476 U.S.at 1718 Martin v. Texas, 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed.497 (1906).

It is likewise asserted that this Court should consider the issue of whether the Petitioner's right to an impartial jury, guaranteed by the Sixth Amendment, has also been infringed by the use of race as a criterion used by the prosecution in exercising its peremtory challenges.

In Batson, this Court stated that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on the account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black Defendant." Batson 476 U.S.at 1719. Clearly, the prosecutor in Petitioner's case indicated that race was a factor in his consideration of the potential jurors and that he had concerns, relative to his challenge of Ms. Dorsey, about "the fact that she was black and the Defendant was black." This is exactly the type of global presumption that the Constitution forbids.

Perhaps no other court has stated the constitutionally mandated concept of totally race-neutral factors in jury selection more clearly than the Court of Appeals of Texas for the First Supreme Judicial District in Houston when it stated in the case of Speaker v. State the following: "While we realize that it may be unrealistic to expect the prosecutor to put aside every

improper influence when selecting a juror, we conclude that that is exactly what the law requires. Thus, a prosecutor's admission that race was an influencing factor in the selection process vitiates the legitimacy of the entire procedure." Speaker v. State, 740 S.W.2d 486, 489 (Tex. App.-Houston (1st Dist.) 1987, no writ).

No influence is more destructive of justice in a particular case nor more detrimental to the entire system of criminal justice than the use of racial categories and characterizations in jury selection. When such racial considerations are shown to have played any significant part in the State's decision to exercise its peremtory challenges in the most serious of all cases, this Court must exercise its discretion to review and correct such abuses.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

SHULTS, HETHERINGTON & TABICS

BY: Robert A Shults

ROBERT A. SHULTS
1800 West Loop South, #950
Houston, Texas 77027
(713) 961-1823

Counsel for Petitioner

APPENDIX

Containing the following materials:

1. Findings of Fact and Conclusions of Law signed by the District Court relative to the hearing on Petitioner's application for a writ of habeas corpus.
2. Petitioner's Proposed Findings of Fact and Conclusion of Law submitted to the District Court.
3. Order of the Texas Court of Criminal Appeals refusing Petitioner's application for writ of habeas corpus.

EX PARTE RICHARD JAMES WILKERSON
WRIT NO. 17,443-02

Habeas Corpus Application from HARRIS County

O R D E R

This is a post-conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

The record reflects that on January 7, 1984, applicant was convicted of the offense of capital murder. Punishment was assessed at death. This Court affirmed applicant's conviction on direct appeal. Wilkerson v. State, 726 S.W.2d 542 (Tex.Crim.App. 1986).

In the instant cause, applicant presents five allegations in which he seeks to challenge his conviction and resulting sentence. The trial court held an evidentiary hearing and entered findings of fact and conclusions of law and recommended the relief sought be denied. This Court has reviewed the record with respect to the allegations now made by applicant and finds the findings of fact and conclusions of law entered by the trial court are supported by the record.

The relief sought is denied on the basis of the trial court's findings of fact and conclusions of law and the stay of execution entered by this Court on September 18, 1987, is vacated.

IT IS SO ORDERED THIS THE 15TH DAY OF MAY, 1989.

PER CURIAM

En banc
Do Not Publish
Teague, J., dissents

CAUSE NO. 383749-A
WRIT NO. 17,443-02

EX PARTE	§	IN THE 179TH DISTRICT COURT
	§	OF
RICHARD JAMES WILKERSON Applicant	§	HARRIS COUNTY, TEXAS

STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Having considered the evidence adduced at the hearing held February 26, 1988, in the above-referenced cause (hereinafter referred to as "hearing"), as well as the official court records concerning said conviction, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Richard James Wilkerson, was charged by indictment in Cause No. 383749 for the felony offense of capital murder.

2. The applicant was found guilty by a jury in Cause No. 383749 for the offense of capital murder; after the jury affirmatively answered the special issues, the trial court assessed punishment at death by lethal injection.

3. The Court of Criminal Appeals affirmed the conviction on direct appeal in an opinion delivered May 14, 1986. **Wilkerson v. State**, 726 S.W.2d 542 (Tex. Crim. App. 1986).

4. Relying on the United States Supreme Court's holding in **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712 (1986), the applicant filed a postconviction writ of habeas corpus in which he alleged that the State systematically struck all blacks from the

jury panel through the use of peremptory challenges.

5. Because the applicant's conviction in Cause No. 383749 was not yet final at the time Batson was delivered, the Court of Criminal Appeals, on September 17, 1987, remanded the cause to the trial court for a hearing on the issue and stayed the applicant's execution pending further orders of the Court. See Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1986).

6. The applicant is a member of an identifiable minority, i.e. black.

7. There were no blacks on the jury that found the applicant guilty in Cause No. 383749 and affirmatively answered the special issues.

8. Four of the State's twelve peremptory challenges were exercised against the following black venirepersons: Audrey Dorsey, Perlie Doze, Ruthie Hines,and Gloria Price.

9. Prosecutors Keno Henderson and Mary Milloy alternated conducting individual voir dire of the members of the venire. Although the prosecutors consulted each other concerning the exercising of peremptory challenges, the view of the prosecutor who conducted the individual voir dire was given more credence (R. I-29).

10. The court finds that prosecutor Henderson's general strategy in selecting a capital jury, including the jury in the instant case, is to accept the first twelve people who he believes can return a death penalty verdict based on the facts of the case (R. I-35).

11. In the instant case, prosecutor Henderson looked for a juror who was (a) intelligent; (b) articulate; (c) able to understand the issues; and, (d) lacked any pre-conceived notions of the death penalty which would interfere with the ability to apply the death penalty (R. I-31-32).

12. In the case at bar, prosecutor Milloy looked for a juror who was (a) bright and (b) articulate (R. I-104).

13. The court finds that the method of jury selection employed by prosecutor Henderson and prosecutor Milloy is race-neutral and does not utilize race, creed or color as a means of purposefully or deliberately denying jury participation to any person, including black persons.

14. Prosecutor Henderson exercised a peremptory challenge against Audrey Dorsey for the following race-neutral reasons:

(a) Ms. Dorsey's initial statements concerning the death penalty indicated that she would have difficulty assessing the death penalty even in an appropriate case;

(b) Ms. Dorsey statements, concerning her belief that some persons who commit murder are not responsible for their actions, led the prosecutor to believe that Ms. Dorsey would hold the State to a higher burden of proof than set by law, namely, to prove that the accused was a responsible person;

(c) Ms. Dorsey indicated that she had strong

opinions and that she did not easily change her mind once she made a decision, causing the prosecutor to think that Ms. Dorsey would be unable to engage in deliberation as a juror;

(d) Ms. Dorsey indicated that she could not consider the full range of punishment, namely, the minimum punishment for murder;

(e) Ms. Dorsey indicated that she would have to be certain that a person who gave a confession was of sound mind at the time he gave the confession, indicating that she would require the State to prove the soundness of the accused's mind at the time of his confession;

(f) Ms. Dorsey indicated that she believed that a confession should be taken in the presence of an individual other than a police officer, prompting the prosecutor to infer that Ms.Dorsey had some problem concerning police officers and their credibility;

(g) Ms. Dorsey indicated that the she would have to believe that the confession was actually true before she would consider it as evidence, leading the prosecutor to think that any inconsistency in any part of the confession would prompt Ms. Dorsey to disregard the entire confession;

(h) Ms. Dorsey indicated that she did not think that it was possible to answer the second special issue, because she did not think that she could predict the future;

(i) Ms. Dorsey did not think that the second special issue was an appropriate issue to consider when determining the imposition of the death penalty;

(j) during the course of the voir dire, the prosecutor developed the feeling that he had irritated Ms. Dorsey and that poor rapport existed between him and Ms. Dorsey.

(R. I-36-46).

15. Prosecutor Henderson exercised peremptory challenge against Perlie Doze for the following race-neutral reasons:

(a) Ms. Doze's spelling and apparent difficulty completing the juror information form indicated some difficulty in understanding the written language, causing the prosecutor concern as to whether Ms. Doze could understand the issues of the case;

(b) Ms. Doze had difficulty answering fairly straightforward and simple questions;

(c) Ms. Doze's employment as a cashier at the Delia Lounge, a place known to the prosecutor for not attracting law-and-order type customers, caused

the prosecutor some concern;

(d) the fact that Ms. Doze first said that she could not consider the death penalty and then quickly stated that she did not understand the question led the prosecutor to think that Ms. Doze did not grasp what the prosecutor was saying;

(e) Ms. Doze indicated that she had a religious feeling about the death penalty and that she thought a person should be given a second chance, prompting the prosecutor to believe that Ms. Doze would never be able to assess the death penalty;

(f) Ms. Doze's comment that she thought the applicant was a nice young man caused the prosecutor to believe that Ms. Doze would be unable to assess the death penalty for someone whom she thought was a nice young man;

(g) Ms. Doze expressed bewilderment that anyone with normal sense could have done such a crime, causing the prosector to worry that Ms. Doze would question whether the applicant was insane or incompetent;

(h) Ms. Doze indicated that she thought the applicant was guilty, but she then stated that she could still presume the applicant to be

innocent, leading the prosecutor to the conclusion that Ms. Doze did not understand the proceedings;

(i) Ms. Doze's responses throughout the voir dire caused the prosecutor to think that Ms. Doze did not understand the proceedings and issues and that she did not have the intellectual ability to make a decision in the instant case..

(R. I-64-71).

16. Prosecutor Henderson exercised a peremptory challenge against Ruthie Hines for the following race-neutral reasons:

(a) Mrs. Hines' job as a cashier in a liquor store caused the prosecutor some concern because of the type of business;

(b) Mrs. Hines' husband was unemployed at the time of voir dire and had been unemployed for eight or nine months; Mrs. Hines, who had two jobs, was the sole support of her family consisting of her husband and two children, prompting the prosecutor to doubt Mrs. Hines' ability to concentrate on the evidence if she were worried about her family's financial needs;

(c) Mrs. Hines indicated that she favored a life sentence rather than a death penalty, although she later stated that a person ought to be given the death penalty, causing the prosecutor

to believe that Mrs. Hines' first response was more valid;

(d) Mrs. Hines felt that her assessing the death penalty was morally wrong, leading the prosecutor to think that Mrs. Hines would be unable to assess the death penalty;

(e) Mrs. Hines indicated that she believed that a defendant would tell the truth, causing the prosecutor to think that Mrs. Hines would believe the applicant if he testified and related things differently than he did in his confession, namely, that he was not guilty;

(f) as a result of the entire voir dire of Mrs. Hines, the prosecutor thought that Mrs. Hines did not really understand what was happening, that she would not be able to make an intelligent, informed decision concerning the case, and that she would not be able to assess the death penalty.

(R. I-79-83).

17. Prosecutor Mary Milloy exercised a peremptory challenge against Gloria Price for the following race-neutral reasons:

(a) Mrs. Price expressed reservations against the death penalty at the outset of voir dire and indicated that she would prefer to assess a life sentence, but she was never able to

articulate her reservations concerning the death penalty;

(b) Mrs. Price stated that she had never thought about the death penalty, causing the prosecutor concern about an individual who had not devoted any previous thought to the death penalty process;

(c) there was an apparent communication problem between the prosecutor and Mrs. Price, which resulted in Mrs. Price sometimes giving unresponsive answers, causing the prosecutor to think that Mrs. Price either did not understand or that she was simply saying what she thought the prosecutor wanted to hear;

(d) Mrs. Price's employment as a lab assistant or technician in a hospital prompted the prosecutor to think that she would tend to see her function as more life-sustaining or life-giving as opposed to sentencing a person to death;

(e) the age of Ms. Price's children caused the prosecutor concern, since the applicant was nineteen years old;

(f) the prosecutor did not think that Ms. Price understood some of the legal explanations which the prosecutor gave.

(R. I-99-105).

18. The court finds that the State did not systematically exclude black persons from the jury in the instant case.

19. The court also finds that the State's explanations for peremptorily striking Audrey Dorsey, Perlie Doze, Ruthie Hines, and Gloria Price were neutral, unambiguous and non-racial reasons relative to the applicant's case, as required by the holding of Batson, id. The court further finds that the State's explanations are credible, plausible and legitimate reasons for exercising those peremptory challenges.

CONCLUSIONS OF LAW

1. This court concludes that the defense made a prima facie showing of discrimination by the State in the jury selection process (R. I-27).

2. This court further concludes that the prosecutors in the instant case did not exercise peremptory challenges in a discriminatory manner to exclude venirepersons based upon racial considerations, nor did they, in any way, purposefully or deliberately deny jury participation to black persons because of race.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in Cause No. 383749-A and transmit same to the Court of Criminal Appeals as provided by the Texas Code of Criminal Procedure. The transcript shall include the following:

1. the entire appellate record in Cause No. 383749, including the Statement of Facts, transcript and appellate opinions;
2. the application for writ of habeas corpus;
3. the Respondent's answer;
4. the Order of the Court of Criminal Appeals delivered on September 17, 1987;
2. the transcript of the Batson hearing held February 26, 1988 and exhibits thereto;
3. the Applicant's Proposed Findings of Fact and Conclusions of Law;
4. the Respondent's Proposed Findings of Fact and Conclusions of Law and Order.

THE CLERK is further ORDERED to send a copy of the Respondent's Proposed Findings of Fact and Conclusions of Law and Order to the applicant's counsel: Robert A. Shults, 1800 West Loop South, Suite 950, Houston, Texas 77027.

PRESIDING JUDGE

WRIT NO. 17,443-02

CASE NO. 383749

EX PARTE	IN THE DISTRICT COURT OF
RICHARD JAMES WILKERSON,	HARRIS COUNTY, T E X A S
APPLICANT	179TH JUDICIAL DISTRICT

FINDING OF FACT AND CONCLUSIONS OF LAW

The Applicant has filed his writ of habeus corpus alleging that the State utilized its peremptory jury challenges at his trial in violation of the United States Constitution as delineated in the case of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This Court held an evidentiary hearing on January 15, 1988 in regard to the Applicant's allegations. The following Findings of Fact and Conclusions of Law are set forth as a result of that hearing:

I.

The Applicant's allegations are that three black persons were veniremen in regard to the selection of his jury and that all three black veniremen were struck by the State peremptorily. This Court so found and further ruled that the Applicant had made a prima facie showing of discrimination pursuant to Batson as reflected on page 27 of the Statement of Facts relative to the writ hearing.

II.

Assistant District Attorney Keno Henderson was called by the State at the hearing and testified that, while the decision to strike a prospective juror peremptorily on the part of the State was a "joint decision" between he and his second chair counsel, Ms. Mary Milloy,

> ...a little more credence was given to the individual that talked to that person (prospective juror) because we felt like they would have a better feeling I guess whether or not they had any rapport with that person or that person was going to believe anything that the prosecutor might have to say. (SF 29-30)

III.

The State further examined Mr. Henderson and the Applicant cross-examined Mr. Henderson regarding the black prospective jurors that he examined and struck during voir dire examination which were Ms. Audrey Dorsey, Ms. Perlie Doze and Ms. Ruthie Hines.

IV.

The Court finds that Mr. Henderson's testimony was candid and truthful and that he delineated various reasons for striking the prospective jurors about which he testified.

V.

However, Mr. Henderson testified as follows regarding the existence of race as a factor in his decision and specifically in regard to the fact that the Defendant was black and the prospective jurors were likewise black.

(a) Testimony Regarding Audrey Dorsey--Under cross-examination by Applicant's counsel relative to his thought processes in regard to the decision to strike Audrey Dorsey, the following transpired:

Q. You know, I am not attacking you, but I have to try to pin you down. When you say you felt a little uneasy about her generally, was it your considered opinion that the fact that she was black and that the Defendant was black might have some factor or might be some factor in her decision-making process?

A. I was not completely satisfied that it would not, but that was my uneasiness.

Q. So in addition to other factors, there was some uneasiness in your mind and your thought processes about the fact that she was black and Mr. Wilkerson was black?

A. Well, no, about the questions in general. But, yeah, about the fact that she was black and the Defendant was black. (SF 52-53)

(b) Examination Regarding Perlie Doze--under cross-examination regarding his reasons for striking Perlie Doze, Mr. Henderson testified as follows:

Q. But, beyond these equivocal answers that you got and these concerns that you had, did it additionally concern you to some extent that she was black and Mr. Wilkerson was black and that that might, and she worked in a lounge that you thought of as being not on the up and up?

A. The only thing I thought perhaps that might come into play would be where when she made the statement he is a nice, young man. I thought perhaps she might make some

identification, I guess, with the Defendant to some extent, but.

Q. Based on being of the same race?

A. Yeah, that is just a factor. (SF 75)

Additionally, Mr. Henderson further testified as follows on re-direct examination regarding veniremen Perlie Doze:

Q. Mr. Henderson, isn't it a fact that many of the State's witnesses were also black witnesses; is that correct?

A. Yes, that is true, as I recall.

Q. And that any consideration that you just mentioned that you might have given between the feeling of identity between Ms. Doze and the Defendant would also work in your favor with regard to your black State's witnesses; is that correct?

A. Well, that is true.

Q. And that that was not a major consideration or the sole consideration for your striking Ms. Doze?

A. One of the many considerations but nothing major about that. (SF 75-76)

VI.

The Court therefore finds that, although Mr. Henderson delineated reasons other than race for striking Ms. Dorsey and Ms. Doze as prospective jurors, he admitted that the race of the Defendant and the race of the veniremen was of some consideration in his decision to strike these prospective jurors.

CONCLUSIONS OF LAW

I.

The Court of Appeals of Texas for the First Supreme Judicial District in Houston stated in the case of Speaker v. State, 740 S.W.2d 486 the following:

> While we realize that it may be unrealistic to expect the prosecutor to put aside every improper influence when selecting a juror, we conclude that that is exactly what the law requires. Thus a prosecutor's admission that race was an influencing factor in the selection process vitiates the legitimacy of the entire procedure. Id. at 489

II.

Additionally, as stated in Judge Teague's concurring opinion in Keeton v. State, 749 S.W.2d 861 (Tex. Crim. App. 1988),

> Of course, if the prosecutor admits that the reason he exercised a peremptory strike on a member of the same race as the Defendant, his candor will unquestionably cause him to fail in satisfying his burden of proof to rebut the Defendant's prima facie case. Id. at 877.

In the instant case, although Mr. Henderson delineated other reasons which were also factors in his decision to strike the jurors as described in the foregoing Statement of Facts, he unequivocally stated that race was one of the "many considerations" that he utilized and that race was likewise "a factor" in his decision.

III.

Therefore, the Court must conclude that the common race of the Applicant and the jurors struck peremptorily by the State was a factor in the prosecutor's decision to exercise his peremptory

challenges and the Court must therefore recommend to the Court of Criminal Appeals that the Applicant's writ of habeus corpus be granted and that his conviction be reversed.

Signed this _____ day of _____, 1989.

_____
Judge, 179th Judicial District

682:87222:19:RAS